UNITED STATES OF AMERICA BEFORE THE NATIONAL LABOR RELATIONS BOARD DIVISION OF JUDGES

BIRNIE BUS SERVICE, INC.

And

Case 3-CA-25653

UNITED FOOD AND COMMERCIAL WORKERS DISTRICT UNION, LOCAL ONE

Alfred Norek, Esq.,
Of Albany, New York
For the General Counsel

Raymond Pascucci, Esq., Of Syracuse, New York For the Respondent

DECISION

Statement of the Case

WALLACE H. NATIONS, Administrative Law Judge. This case was tried in Utica, New York on March 29, 2006. The original charge was filed by United Food and Commercial Workers District Union Local One (herein Union) on November 17, 2005¹. An amended charge was filed by the Union on December 1, 2005. On January 31, 2006, the Region issued a Complaint and Notice of Hearing which alleges that Birnie Bus Service, Inc. (Birnie or Respondent) has engaged in conduct in violation of Section 8(a)(1) of the National Labor Relations Act (Act). Respondent filed timely answer in which, inter alia, it admits the jurisdictional allegations of the Complaint and that its Regional Manager, Eric Taylor, has been at all material times a supervisor of Respondent within the meaning of Section 2(11) of the Act and an agent of Respondent within the meaning of Section 2(13) of the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, a corporation, with a place of business and facility in Utica, New York, has been engaged in providing school bus transportation service. It annually derives gross revenue in excess of \$250,000 and purchases and receives at the Utica facility goods and services valued in excess of \$10,000 directly from points located outside the State of New York. The Respondent admits and I find that it is an employer engaged in commerce within the

¹ All dates are in 2005 unless otherwise indicated.

meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

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The Complaint alleges that on or about the dates below, Respondent, through Eric Taylor, at the Utica facility:

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(a) October 5, 2005, interrogated its employees about whether they had engaged in union activities.

(b) October, 2005, interrogated an employee about the employee's union sympathies and solicited an employee to oppose the Union.

(c) October 18, 2005, interrogated an employee about the employee's knowledge of union activities.

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- (d) October, 2005, promulgated and has since maintained an overly broad rule against solicitation and distribution.
- (e) November 2005, implied that an employee's Union activity would tend to exclude the employee from consideration for a position as a confidential employee.

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A. Background and Factual Setting For the Complaint Allegations

The facts adduced in this case are skeletal outside a description of the meetings between management and employees that give rise to the Complaint. Birnie provides school bus service, as pertinent, in the Utica, New York vicinity from its Utica terminal and office. Eric Taylor is Birnie's Regional manger and manager of the terminal. His assistant is Bud Crossman and as of the time of the events in question, Maureen Ray was the head dispatcher, supervising two other dispatchers. The Utica facility consists of an office building, maintenance facility, a bus parking lot and an employee parking lot, all on Birnie's property. As far as the record reflects, the office building houses management offices, a dispatch office and a driver's lounge which also serves as a lunch and break room for employees.² At one end of the driver's lounge is the dispatch office with a window to the lounge. The driver's lounge has a door which serves as an entrance/exit to the bus parking lot. The office building is raised, so there are three or four steps down from the building to the level of the bus lot.

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There is an issue in this case concerning when Respondent's drivers are on duty within any given work day. It plays a small part in the "interrogation" section of this decision and a larger one in the section dealing with Respondent's distribution and solicitation rule. Not all drivers have the same hours. Each driver has what is called a "clip time." Most drivers have a morning run and an afternoon run. The clip time includes the run time and time allotted for the driver to conduct a pre-run and post-run bus inspection. This is the time for which the drivers are paid. As part of the clip time, there is a key time. This is the time a driver is expected to be at work ready to begin. It is the beginning of the driver's clip time. A driver having both a morning and afternoon run would have a clip time for each run.

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For example, if a driver had a clip time of 7:00 am, the driver would have to be ready to go at 7:00 am, conduct the pre-run inspection and leave the facility at 7:15 am. The drivers are expected to be back at the facility in enough time before the end of their run, in this case morning run, to complete the post-run inspection before the end of their clip time. Some may

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² Throughout this decision, driver's lounge will be used to also mean lunch room or break room.

finish their run and inspection a little early and still have five or ten minutes on their clip time, five or ten minutes for which they are paid. The times for runs are not the same as different schools have different starting and ending times for classes. Thus, clip times are not the same for all employees, and employees can be entering and leaving the office at the same time. Some employees coming in are still on clip time, whereas others may be off duty. In between runs, the drivers are not being paid and are off duty. Between the morning and afternoon runs most drivers go home though some remain in the driver's lounge. If a driver is in the driver's lounge and clip time begins, the driver exits through the door to the bus parking lot and is on duty

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In 2005, the Union began a campaign in about September, to represent a unit of Respondent's employees including all full time and part time drivers, monitors, and mechanics employed by Respondent at its Utica facility. Based on GC Ex. 2, the number of employees in the unit was 155. The campaign kicked off with the mailing in September of a questionnaire for Respondent's employees which sought employees' names, addresses, phone numbers, job class, years of service and shift. It also sought information about the employees' current status with Birnie, and whether the Respondent had kept promises made to the employees during a previous Union campaign.³ There had been a similar campaign the previous year which had resulted in an election in January. Respondent's driver/employee Nicole Cioch was the Union's observer in that election.⁴ The Union lost that election. The 2005 campaign resulted in an election held in January 2006, which the Union also lost. The vote was 56 for the Union and 72 against the Union, with 11 challenged ballots.⁵

Cioch, one of the two employees most involved in the events of this case, must be viewed as a known Union supporter, if by nothing else, her role in the earlier election. Employee/driver Richard Coromato is the other employee in this case alleged to have been unlawfully interrogated and, is the only employee alleged to have been solicited to dissuade other employees from supporting the Union. Whether he can be viewed as a known supporter of the Union is questionable. The evidence reflects that he stated to management that he was not in support of the Union, but by its actions, management clearly had suspicions that he did support it. During the course of the campaign in the fall of 2005, Cioch applied for the job of night dispatcher and was ultimately not picked for the position. She was thereafter terminated before the end of the year. She filed charges alleging unlawful discrimination with the Board over Respondent's decision not to give her the night dispatcher position and for her termination. Coromato was terminated in late October and also filed charges with the Board alleging that his termination was discriminatorily motivated. An investigation was conducted by the Region and these charges were dismissed. Thus, I must assume that the Region did not find sufficient evidence of unlawful discrimination in these respects involving Cioch and Coromato to even issue a Complaint. As a result of Respondent's actions, however, both Cioch and Coromato were clearly hostile witnesses in this proceeding. The allegations of unlawful interrogation and solicitation are based solely on the testimony given by and charges filed by Cioch and Coromato. The allegation in the Complaint alleging an overly broad rule against solicitation and distribution is based on the testimony of one employee, Union supporter Jaime Colon.

I believe that what has not been shown is perhaps as important to this decision as what

³ This questionnaire was prepared in June or July by Union organizer Samantha DeRiso.

⁴ In an affidavit given to the Board in connection with the first campaign and election, Cioch wrote that no one in management questioned her or threatened her during this campaign.

⁵ Two votes were cast for a competing union, raising the vote count for unions in general to 58.

was shown from the evidence adduced. Aside from the incidents involved in this Complaint, there is no evidence whatsoever of (1)employee harassment by Respondent, (2) an aggressive anti-Union campaign by Respondent, (3) threats, promises, or surveillance of employees by Respondent, or (4) warnings, discipline or other adverse personnel actions taken by Respondent during or as a result of the Union campaign. Other than the events here involved, the campaign was a virtual non-event insofar as allegations of objectionable conduct or the commission of unfair labor practices are concerned.

Specific dates for the various meetings or conversations that form the basis for the Complaint allegations are truly anyone's guess. In my view, no witness had a firm memory of when any particular meeting or conversation happened, though all agree to the extent that they took place at all, they took place in late September or early October. In general, they do agree about the sequence in which the meetings took place.

B. Did Respondent unlawfully interrogate employees in October?

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Richard Coromato was employed by Respondent as a driver from February through October, when he was terminated. ⁶ Taylor was his immediate supervisor. Coromato testified about a conversation he had with Taylor on or about October 11. He testified that the conversation took place in Taylor's office and involved only Coromato and Taylor.⁷ Coromato testified vaguely that he was in Taylor's office to present his side to some personnel conflicts having nothing to do with the Union or the Union campaign. When that conversation ended, Taylor asked him to stay. Taylor told him that he had been told that Coromato and fellow driver Nicole Cioch were distributing Union flyers to employees outside the office building door leading to the bus parking lot. The employees were in the process of going to or coming from bus runs and were on duty. Taylor asked Coromato if this were true. Coromato denied having any knowledge about this accusation. He told Taylor that he was not on the Union mailing list and had not received anything from the Union. On cross examination, Coromato agreed with Respondent's counsel that from the outset of the conversations with Taylor, he loudly proclaimed that was not pro-union. Taylor said he had a witness who saw them. Coromato denied doing what he was being accused of doing. He asked that he and Cioch be allowed to confront the witness. Taylor agreed to try to set up a meeting.

On the following day, October 12, Cioch and Coromato met with Taylor in his office. Cioch testified that she had learned from Coromato that the two of them had been accused of handing out Union pamphlets at work. Coromato asked for the identity of Taylor's witness and Taylor said the person was not coming in and did not feel obligated to do so. Coromato argued that they had the right to confront their accuser since neither of them had done what they were accused of doing. Taylor said he could not force the person to come in. Coromato asked Taylor to take a few days to try to convince the person to come forward. He added that he did not want to be labeled as Union at that point. Taylor said he would try and the meeting ended.

⁶ Coromato was terminated for allegedly incorrectly handling a situation involving a student on his bus. According to Coromato, he was attempting to stop a male student from physically injuring other students and in the process pulled the boy to the front of the bus. Taylor testified that Coromato struck the unruly student. The event was caught on videotape. The termination was the basis of a charge with the Board in November. This charge also alleged the unlawful interrogation which is involved in this case. The termination part of the charge, as noted above, was dismissed after investigation by the Region.

⁷ On cross examination, he admitted that Maureen Ray may have been in attendance at this meeting, but was not sure.

There was another meeting called about a week later. This meeting had been requested by Cioch and Coromato and took place in the Respondent's training room. In attendance at this meeting were Taylor, Cioch, Coromato, Ray, and Crossman. Taylor opened the meeting by saying that he just wanted to get everything straightened out and make sure this was over with, saying that the accuser was coming. At that point, employee Cheryl Hertel walked in and sat at the table in the room. The accused asked Hertel the names of employees to whom they were allegedly giving pamphlets, and asked how she knew they were pamphlets. According to Coromato, Hertel said that on Cioch's clipboard, she had seen a white envelope. Cioch responded that the clipboard did not have Union literature on it. Coromato testified that this was Cioch's paycheck. Coromato stated that Taylor had told him that she had seen Coromato and Cioch passing out pamphlets. According to Coromato, the discussion became heated and ended with Hertel recanting what she had claimed to have seen. Coromato testified that Hertel said that two other employees had told her that they had seen the pamphlets being passed out and Hertel had simply passed this information on to Taylor. According to Cioch, Taylor asked no questions at this meeting.

Taylor testified about these meetings. Taylor became aware of the new Union organizing campaign when employee Jaime Colon told him about it in October. As to the reason for the meetings, Taylor testified that Hertel came to him and told him that Cioch and Coromato were passing out Union literature. According to Hertel, the two were on the steps leading up the driver's lounge talking to employees coming in and out of the building. Hertel also claimed that Cioch and Coromato were stopping employees on their way to their bus runs. According to Taylor that concerned him because it was taking away time the drivers were to use to conduct their pre-trip bus inspection.

Taylor did not remember the first meeting as testified about by Coromato. The first meeting he remembered on this subject involved both Coromato and Cioch. He remembered being at the meeting were himself, Coromato, Cioch, Ray and Crossman. Taylor called in Cioch and Coromato asked whether they were passing out Union literature telling them an employee had complained they were stopping employees from going to their buses. Both said no and denied they were passing out anything. Coromato became upset and wanted to know who was accusing them. Taylor said he would speak with that person. According to Taylor, this was all that happened at this meeting.

Maureen Ray remembers this meeting being attended by herself Taylor, Cioch and Coromato. She testified that Taylor asked the two employees if they were passing out union literature and stopping drivers from going to their buses. Ray testified that both employees were upset. According to Ray, Coromato said he wanted nothing to do with the Union and wanted to know the identity of his accuser. Ray testified that Cioch said that she and Coromato were discussing a charter. Ray testified that Taylor apologized and said he would look into the matter. Ray testified that she was asked to be in this meeting by Cioch and Coromato.

Following this meeting, Taylor talked to Hertel and she agreed to meet with Cioch and Coromato. Another meeting was set and was held in the training room. In attendance were Taylor, Ray, Crossman, Hertel, Coromato and Cioch. According to Taylor, Hertel said that she was concerned that Coromato and Cioch were passing out Union literature at the entrance to the driver's lounge. Coromato denied the accusation and was upset that she was accusing him. Taylor testified that after the meeting he thought the matter was settled as they had talked it out. Hertel apologized and said she must have been mistaken. According to Taylor, Cioch said the clipboard contained her bus charter slip. Taylor said that they never looked at what was supposedly being passed out nor did he ask Cioch or Coromato for anything. According to

Taylor, Hertel was given a warning about this incident. No one questioned this assertion at the hearing and I take it as fact.

On or about October 22, Cioch had another meeting with Taylor. Also present for this meeting was another driver, Paul Zogby. They had asked for the meeting to find out why Coromato had been terminated. At the outset of the meeting, Taylor asked his two employees if they were handing out Union pamphlets. They told Taylor they were not there to discuss the Union, but to discuss Coromato's termination.

Taylor's version of this meeting varied from Cioch's version. According to Taylor, Cioch and Zogby asked why Coromato had been terminated and Taylor said he could not disclose that information as it was confidential personnel information. They then asked to speak with Respondent's Vice President John Warren. According to Taylor, nothing about the Union came up in the conversation which he said lasted about five minutes. Taylor denied raising anything about the Union in this conversation and he stated that neither Zogby nor Cioch raised anything about the Union. I credit Taylor's version of this meeting. There is no rational reason Taylor would ask Zogby and Cioch if they were passing out Union literature. Neither Cioch nor the Union filed any charge over unlawful behavior by the Respondent until after she was discharged. I believe her testimony about this meeting is not credible. Thus, I find that the subject of the Union did not come up in this meeting.

As summarized in Medicare Associates, Inc., 330 NLRB 935, 939-940 (2000):

...the applicable test for determining whether the questioning of an employee constitutes an unlawful interrogation is the totality-of-the circumstances adopted by the Board in *Rossmore House*, 269 NLRB 1176 (1984), aff''d sub nom., *Hotel Employees Union Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985), and adhered to by the Board for the past 15 years. We also agree that in analyzing alleged interrogations under the *Rossmore House* test, it is appropriate to consider what have come to be known as the "*Bourne Factors*," so named because they were first set out in *Bourne v. NLRB*, 332 F2d. 47, 48 (2d Cir. 1964). Those factors are:

- (1) The background, i.e., is there a history of employer hostility and discrimination?
- 35 (2) The nature of the information sought, e.g. did the interrogator appear to be seeking information on which to base taking action against individual employees?
 - (3) The identity of the questioner, i.e. how high was he in the Company hierarchy?
- 40 (4) Place and method of the interrogation, e.g., was the employee called from work to the boss's office?
 - (5) Truthfulness of the reply.

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...[W]e note that these and other relevant factors "are not to be mechanically applied in each case." 269 NLRB at 1178 fn. 20. As the D.C. Circuit Court of Appeals has similarly noted, determining whether employee questioning violates the Act does not require "strict evaluation of each factor; instead, "[t]he flexibility and deliberately broad focus of this test make clear that the *Bourne* criteria are not prerequisites to a finding of coercive questioning, but rather useful indicia that serve as a starting point for assessing the "totality of the circumstances." *Perdue Farms, Inc. v. NLRB,* 144 F3d. 830, 850 (D.C. Cir. 1998), quoting *Timsco, Inc. v. NLRB,* 890 F2d. 1173, 1178 (D.C. Cir. 1978). In the

final analysis, our task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act."

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Looking at the facts of this case from with the *Bourne Factors* in mind, first, there is no history of employer hostility and discrimination. As I noted at the outset of this decision, other than the incidents raised herein, there was no showing of any of the indicia of a hostile campaign by Respondent and no showing of any incidence of employee intimidation or threats. Thus the first, and as far as I can see, the rest of the meetings took place absent any atmosphere of reprisal.

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With respect to the second factor, Taylor was seeking information that, as far as the evidence shows, would have led in the worst case scenario to Coromato and Cioch being told to stop passing out literature to employees on duty. There was nothing in anyone's testimony about Taylor's demeanor that would indicate that he was looking for a reason to discipline the employees involved and indeed, neither of them testified that they feared retaliation in or as a result of the meetings. If Respondent were motivated by anti-union animus, it certainly took an unusual step as a result of the interrogations. It warned the accuser Hertel for wrongly accusing the other employees.

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With respect to the third and fourth factors, Taylor is the highest ranking person at the facility with only Crossman below him on the Utica hierarchy. Coromato and Cioch testified that Taylor is their direct supervisor, so he would be the logical person to speak with them about any problem with their job. Indeed, Cioch testified about coming to Taylor in September to speak with him about a personal situation with someone in the dispatch office. Coromato was in Taylor's office at Coromato's request on a personal matter, when Taylor first interrogated him about the matter in question. According to Coromato every other meeting was at the request of himself or at the request of both he and Cioch.

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With respect to the last factor, both Cioch and Coromato denied doing what they were accused of and Taylor accepted the denials, warning Hertel for making false accusations.

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In conclusion, I do not find the interrogations to be unlawful. It is clear that Respondent does not allow solicitation of employees on duty. As far as this record is concerned, that applies to all solicitations, not just Union ones. Taylor had a legitimate interest in determining if solicitations of on-duty employees was happening as had been reported to him. I cannot envision a *less* chilling way to go about finding the answer to that question than the way he chose. Based on the foregoing, I recommend dismissal of this portion of the Complaint.

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C. Did Respondent unlawfully solicit an employee to dissuade other employees from supporting the Union?

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According to Coromato, a few days after the last "interrogation" meeting, he again met with Taylor. Coromato testified that this meeting was between only him and Taylor. Coromato told Taylor that he was not satisfied with the outcome of the prior meeting. According to Coromato, Taylor then turned the meeting to the Union, saying that the Union "costs too much for these people to afford and that it was \$24 a paycheck (and) that the people can't afford that." On cross examination, Coromato testified that he told Taylor that he did not agree with that

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assertion based on his past experience as a union steward with the New York Corrections Department. Coromato said it would be more like \$6 a week. Coromato testified that Correction's employees make more money than bus drivers. Coromato testified that Taylor was "asking him to go out and try to dissuade these people to confer or talk to the Union or consider the Union. Coromato said that he would not do that nor would he tell them to join the Union. Taylor asked if he would vote for the Union, and Coromato replied he would make that decision when he had all of the information in front of him.

Taylor remembered a conversation with Coromato to about some of the topics mentioned by Coromato. He believed the conversation took place in the driver's lounge. Taylor does not remember exactly how the conversation started, just remembering that Coromato stated that he had worked for the Department of Corrections and was a part of a union.⁸ According to Taylor, they then had a general discussion "of our employees about they can't afford to have a union. Taylor testified that Coromato said that he made good money then and was involved with the union. According to Taylor, Coromato said that it (a union) would not do any good for these (Bernie's employees) because they really could not afford it. Taylor testified that Coromato initiated this part of the conversation. Prior to this conversation, Taylor was unaware that Coromato had been in a union.

Taylor denied asking Coromato whether he had been a member of the Union in his prior employment, whether he had paid union dues in that position, or whether he thought the dues were too high. Taylor denied asking Coromato whether his co-workers at Birnie's could afford union dues and vigorously denied asking Coromato to talk with his co-workers about anything having to do with the Union. Taylor denied at any time asking Coromato to campaign against the Union. He denied asking Coromato about his opinion about the level of dues the Union would charge at Respondent.

Coromato testified that he had another conversation with Taylor on October 18. This conversation took place in the Respondent's bus parking lot. Coromato was parking his bus and Taylor was parking his bus. Taylor left his bus and walked over to Coromato and assisted him in parking as another bus had to be moved. When the parking was complete, Taylor asked him how he was feeling with things. Coromato said he was still not satisfied, he felt he was being labeled. Taylor then asked him a question about the Union. Coromato told him he was not involved and would not get involved with talking to any of the employees about the Union, for or against, until he had all the information. He added he had received no information from the Union.

Taylor denied ever having a conversation with Coromato in the bus parking lot.

Carefully considering the testimony of both men and their demeanor, I credit Taylor's testimony and denial of Coromato's allegations. Coromato has made an "out of the blue" accusation that finds support from no other witness or any other action taken by Respondent. It appears totally out of character for Taylor, and for that matter the Respondent, given the almost "squeaky clean" campaign that Respondent waged. Having credited Taylor's testimony over that of Coromato in this regard, I find that Respondent has not unlawfully interrogated an employee about the employee's union sympathies nor has it unlawfully solicited an employee to oppose the union. I will recommend that these Complaint allegations be dismissed.

⁸ At a later point in his testimony, Taylor remembered this topic came up because Coromato had just finished a charter trip with some older children and they had been bad on the bus. It reminded Coromato of his days with the Department of Corrections.

D. Did Respondent unlawfully imply that an employee's Union activity would tend to exclude the employee from consideration for a position as a confidential employee?

Nicole Cioch was employed as a monitor or driver by Birnie from September 9, 2004 until her termination in late November. In early November, three employees applied for the position of night dispatcher, Nicole Cioch, Jennifer Johnson and Deana Dorfman. Johnson received the position. According to Taylor, Johnson received the position because she was a part-time dispatcher for about a year and a half.

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Cioch testified about this application process from her perspective. She was interviewed for this position in a meeting with Taylor, Ray and Crossman. According to Cioch, Taylor brought up the fact that the dispatcher was a confidential position and Respondent was worried if they put a Union supporter in that position, that confidential information such as employees' addresses and phone numbers would be leaked to the Union. Cioch told Taylor that confidentiality would not be a problem. Cioch did not get the dispatchers job. Cioch agreed that the person who got the job had more experience, as that employee had dispatched during the day. Cioch filed a charge over the failure of Respondent to give her the job, claiming it was retaliation because Cioch was pro-union. She testified that she was upset with the Company. This claim was dismissed by the Region.

Taylor testified that there were two interviews with Cioch about the position. At the first interview, Cioch was interviewed by Ray and Crossman. Taylor did not attend this interview. The first interview was intended to screen the three applicants for a second interview. Dorfman did not get a second interview, as did Cioch and Johnson. Ray testified that she and Crossman were impressed by both Cioch and Johnson and both received a second interview.

At the second interview, Taylor, Ray, Crossman and Cioch were present. They talked about various scenarios that might arise in the position. Then the subject shifted to the confidential nature of the position. It is confidential because the dispatcher has employee phone numbers, addresses, payroll information, hours worked and other personal information. He pointed out that this information could not be given out, something he told each applicant for the job. According to Taylor, Cioch raised the issue of her unlisted telephone number being given to the Union. She did not think that was right. Taylor responded that the Company was checking to see how many employees' phone numbers had been given out. He testified that was all that was said about the matter.

Ray testified that when the subject of confidentiality came up, Cioch became upset because her phone number had been given out to the Union by another dispatcher. According to Ray, Cioch said that dispatch had already handed out her phone number. Cioch asked how the office has to be confidential when it is not confidential. Ray testified that Taylor apologized and that he was in the middle of taking care of the situation. Ray testified that Cioch mentioned the Union. Ray denied that Taylor said anything about the Union.

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I credit the testimony of Ray and Taylor over the testimony of Cioch about this meeting. Not only was Cioch admittedly hostile to the Company, her behavior on the stand fully supports the testimony of Taylor and Ray and undercuts her own testimony. When the matter of this meeting was discussed on cross examination with Cioch, she launched into a tirade about the actions of a person in the dispatch office giving out damaging personal information about her. Cioch had had an earlier meeting with Taylor about her concerns that someone in the dispatch office was using her personal information to cause her personal difficulties, unrelated to work. Cioch denied this subject came up in the interview session. I simply do not believe this. I do

believe Ray and Taylor and based on their credited testimony, can find no evidence that they implied that Cioch's Union activity would tend to exclude her from consideration for a confidential position.

E. Did Respondent promulgate and thereafter maintain an overly broad rule against solicitation and distribution?

Jaime Colon has been a driver for Birnie for five years. Like most drivers, Colon has a break between his morning and afternoon runs of about three hours. Colon testified that he usually goes home for this break. He is familiar with the driver's lounge and testified that some drivers stay there during their break. Colon testified that a lot of selling goes on in the driver's lounge, including Girl Scout cookies and raffle tickets. Cioch testified that in the driver's lounge, employees sell candles, Avon, and raffle tickets. Coromato testified that in the driver's lounge employees sold Avon, candles and magazines to other employees. He was unaware of any prohibitions on employees distributing materials among themselves in the break room.

In mid October, Colon had a conversation with Taylor in the break room between 1:15 pm and 1:30 pm. Colon was passing out Union authorization cards. Taylor came from his office and according to Colon told him that he did not want Colon passing out the cards to the employees. Colon testified that he had put the cards away before Taylor approached him and he believed that Taylor was acting on information provided by someone else and had not seen him pass out the cards. Colon testified that Taylor never told him he was free to distribute the cards to employees in non-work areas on non work time. Taylor never told him he was free to distribute the cards in the break room during a break.

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Colon denied having a conversation with Taylor about stopping employees on the way to their bus runs. He denied distributing Union calendars in the break room, noting that he did not have any calendars to distribute. He denied handing out the union questionnaire in the bus parking lot. He denied having seen the Union questionnaire mailed in September. Though Colon gave straight answers on direct examination, on cross examination, he was extremely evasive and many of his answers did not ring true.

Taylor testified that he was aware that Colon was passing out Union calendars. Taylor testified that an employee told him that Colon was bothering people in the break room, presumably by passing out authorization cards. Taylor testified that he "kind of whispered to him in his ear and said not to pass it out while people are trying to go out to their runs and come back in." On cross examination, this changed slightly to "not to bother anyone who is coming in or out." Taylor also mentioned cards or flyers in this whisper. To the extent there is a conflict between what Colon testified that Taylor told him and what Taylor testified that he said, I credit Taylor's version.

Taylor testified that Colon had passed out literature in the employee parking lot and he had no problem with that. Taylor testified that passing out literature in the break room was no problem so long as the employees being solicited were not trying to leave for their runs or come back in. Taylor noted that Colon had also passed out literature in the break room. Taylor testified that employees had told him that as had Colon himself. Taylor testified that he told Colon not to bother drivers coming from and going to runs because they are on work time.

Taylor testified that he did nothing to stop the passing of authorization cards in the driver's lounge. He testified that Union calendars and Union questionnaires were also passed out there. The questionnaires were also passed out in the employee parking lot. The Respondent took no action to stop these practices. Cioch, certainly no friend of the Respondent

on the day she testified, testified that no one from management ever told her she could not hand out literature in the driver's lounge. This was never an issue with her. She agreed that distributing Union literature in the driver's lounge was never an issue.

General Counsel on brief first cites cases holding that policies prohibiting union solicitations on employer premises are presumptively invalid and that selectively enforcing such rules only against union solicitations is unlawful. There is no showing that there was any prohibition by Respondent of solicitation and distribution of Union material on Company property. Even Cioch agreed that distributing Union literature in the driver's lounge was never a problem. Distribution of Union material and Union solicitations in the employee parking lot was allowed. The question is, was it unlawful for Taylor, however so gently, to prohibit Colon from passing out authorization cards to persons entering and leaving the lounge, presumably on clip time. I do not believe it is sufficient to establish that Respondent did not prohibit the sale or distribution of non-Union items such as raffle tickets in the lounge, to establish that Respondent's prohibition as worded to Colon was unlawful. The is no showing that employees tried to sell Avon, raffle tickets or girl scout cookies to drivers coming from and going to a bus run. The union does not have the right to solicit or make distributions to employees while they are working. There is no proof whatsoever that Respondent allowed any solicitation of employees for any non-work related reason while they were on duty. I believe that is the sum and substance of what Taylor told Colon. Thus, I can find no selective application of Respondent's rule against solicitation and distribution. According, I find that Respondent did not unlawfully promulgate an overly broad rule against solicitation and distribution.

Conclusions of Law

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- 1. Respondent, Birnie Bus Service, Inc, is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.
- 2. United Food and Commercial Workers District Union, Local One is a labor organization within the meaning of Section 2(5) of the Act.
- 3. Respondent did not commit any of the unfair labor practices alleged in the Complaint.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁹

ORDER

The complaint is dismissed.

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Dated, Washington, D.C., May 17, 2006

45 Wallace H. Nations
Administrative Law Judge

 ⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.